

Recusal & the Bounds of Judicial Bias

An Interview with [Alicia Bannon](#) of the Brennan Center for Justice.

With incredible powers to make life changing decisions involving liberty and fortune, judges are expected to make decisions with a threshold level of neutrality. In this conversation, we explore the limits of that threshold – when does judicial bias legally or ethically preclude a judge from hearing a case. Alicia Bannon (director of the Judiciary Project at the Brennan Center for Justice) explains the laws and limits on judicial recusal and where gray areas remain.

Bannon goes on to explore contentious contemporary examples such as cases involving Justice Thomas and his wife's connection to cases involving the January 6th violence as well as cases involving former President Trump. Bannon explains that the constitutional test for recusal (under the Due Process protections) is “serious risk of actual bias.” The conversation goes on to explore the limits of that test and potential reforms to improve the integrity of U.S. courts.

[Judicial Ethics and Recusal Project](#) – Brennan Center for Justice

Relevant Cases

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- [Williams v. Pennsylvania](#) - Supreme Court of the United States (2016)
- [Caperton v. Massey](#) - Supreme Court of the United States (2009)
 - “Serious Risk of Actual Bias” standard
- [Williams-Yulee v. The Florida Bar](#) – Supreme Court of the United States (2015)

Relevant Rules and Laws

[Rule 2.11: Disqualification Model](#) – Code of Judicial Conduct: Canon 2

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

- (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
- (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
- (c) was a material witness concerning the matter; or
- (d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

[28 U.S. Code § 455](#) – - Disqualification of justice, judge, or magistrate judge

- (a) Any justice, judge, or magistrate [judge of the United States](#) shall disqualify himself in any [proceeding](#) in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the [proceeding](#);
 - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the [proceeding](#) or expressed an opinion concerning the merits of the particular case in controversy;
 - (4) He knows that he, individually or as a [fiduciary](#), or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the [proceeding](#), or any other interest that could be substantially affected by the outcome of the [proceeding](#);
 - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the [proceeding](#), or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the [proceeding](#);
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the [proceeding](#);
 - (iv) Is to the judge's knowledge likely to be a material witness in the [proceeding](#).
- (c) A judge should inform himself about his personal and [fiduciary](#) financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1)“proceeding” includes pretrial, trial, appellate review, or other stages of litigation;

(2)the degree of relationship is calculated according to the civil law system;

(3)“fiduciary” includes such relationships as executor, administrator, trustee, and guardian;

(4)“financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i)Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(ii)An office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(iii)The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv)Ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e)No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f)Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

